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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91212680
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FRITO-LAY NORTH AMERICA, INC.,

Opposer,

vs.

REAL FOODS PTY LTD.,

Applicant.

Opposition No. 91212680

Opposition No. 91213587

APPLICANT REAL FOODS PTY LTD.'S SUPPLEMENTAL BRIEF

Pursuant to the Parties' ACR Stipulation, dated November 4, 2015, Applicant Real Foods Pty. Ltd. ("Real Foods"), by its attorneys, submits this Supplemental Brief in response to the Supplemental Brief, dated December 1, 2015, of Frito-Lay North America, Inc. ("Frito-Lay").

I. Frito-Lay's Arguments Ignore (or Pervert) the Teachings of the Federal Circuit in *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*

In its Supplemental Brief, Frito-Lay fails to draw any lessons from the Federal Circuit's decision in *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 114 USPQ2d 1827 (Fed. Cir. 2015), despite being a party in that case. Instead, it repeats the same legal arguments roundly rejected by the Federal Circuit. First, Frito-Lay continues to dismiss the public perception of the marks CORN THINS and RICE THINS in their entirety and improperly focuses on the meaning of each of the terms "corn", "rice", and "thins". A proper consideration of the marks as a whole, and as applied to the goods, compels the conclusion that they are protectable trademarks, both as suggestive designations and those identified with a single source of popped corn and rice cakes, and not generic or incapable of trademark significance.

Second, Frito-Lay argues that despite the Federal Circuit's admonitions to the contrary in the *Princeton Vanguard* case, the Board should disregard the results of the *Teflon* survey Real

Foods commissioned in this case on the grounds that such surveys are inadmissible except when testing whether coined terms have become generic through usage over time. This perversion of the Federal Circuit's ruling is incredible. In fact, the Federal Circuit's decision *directed* the Board to consider Princeton Vanguard's *Teflon* survey.¹ Likewise, here the Board is compelled to consider Real Foods' survey, which found that the clear majority of consumers (52%) regard CORN THINS as a brand name rather than a common name.

In order to enable the Board to appreciate Frito-Lay's gross mischaracterization of the *Princeton Vanguard* case, Real Foods sets forth a brief summary of the Federal Circuit's ruling. As the Federal Circuit noted, the Board sustained Frito-Lay's opposition against the mark in issue in that case, PRETZEL CRISPS as it:

[a]t the outset the Board found that 'pretzel crisps' is a compound term, not a phrase, and analyzed the terms individually. Specifically, the Board found that the term 'pretzel' in PRETZEL CRISPS is generic for pretzels and pretzel snacks, and the term 'crisps' is generic for crackers. In reaching this conclusion the Board cited: (1) media references and third-party use of the term 'crisps' to identify crackers; (2) registrations disclaiming the term 'crisps'; (3) dictionary definitions of the word 'crisp'; (4) Princeton Vanguard's admission that its packages for its PRETZEL CRISP products provide nutritional facts for a serving size of a stated number of 'crisps'; (5) a few generic references to the combined term 'pretzel crisps'; and (6) the surveys of two of the parties' experts.

Id. at 1828-29 (internal citations omitted).

After discussing the two surveys considered by the Board, the Federal Circuit noted "[t]he Board indicated that it considered the entire record, including the surveys, but gave 'controlling weight to the dictionary definitions, evidence of use by the public, including use by the media and by third-parties in the food industry, and evidence of use by defendant itself.' On this record, the Board found 'PRETZEL CRISPS' is generic for 'pretzel crackers.'" *Id.* at 1829

¹ To be sure PRETZEL CRISPS is no more 'coined' a designation than RICE THINS or CORN THINS. Indeed, Real Foods contends its marks are suggestive; by contrast Princeton Vanguard conceded PRETZEL CRISPS was descriptive. See *Princeton Vanguard*, 114 USPQ2d at 1828.

(internal citations omitted). The Federal Circuit further recounted the Board’s rationale that its holding would have been unchanged regardless of whether it considered the designation PRETZEL CRISPS as a phrase instead of a compound term because “the words strung together as a unified phrase also create a meaning that we find to be understood by the relevant public as generic for ‘pretzel crackers.’” *Id.* (citations omitted). Given the Board’s holding that the designation was generic, it never reached the question of whether PRETZEL CRISPS had acquired distinctiveness.

The Federal Circuit found the Board’s reliance on this evidence was misplaced, and its analysis inconsistent with the requirement that a determination of whether a designation functions as a protectable trademark be made in view of the meaning of the mark as a whole, rather than a consideration only of the composite parts of the mark.

As the Federal Circuit noted:

The Board appears to believe that there is a dichotomy in the standard applicable to a particular mark depending on whether it is a compound term or a phrase. According to the Board, if the mark is a compound term, then *Gould* [*In re Gould Paper Corp.*, 834 F.2d 1017 (Fed. Cir. 1987)] applies, and it can focus on the individual words, but if it is a phrase, *American Fertility* [*In re Am. Fertility Soc’y*, 188 F.3d 1341, 1347 (Fed. Cir. 1999)] requires that the Board consider the mark in its entirety. (citation omitted) Because the Board found “no additional meaning added to ‘PRETZEL CRISPS’ in relation to ‘pretzel crackers,’ when the individual terms are combined,” the Board analyzed it as a compound term. The Board then considered the terms individually and concluded that ‘pretzel’ is generic for pretzels and pretzel snacks, and ‘crisps’ is generic for crackers.

Id. at 1830 (internal and further citations omitted).

The Federal Circuit went on to find the Board’s reasoning fatally flawed:

The problem with the Board’s analysis is that there is only one legal standard for genericness: the two-part test set forth in *Marvin Ginn. Am. Fertility*, 188 F.3d at 1348. As noted, to determine whether a mark is generic under that test, the Board must first identify the genus of goods or services at issue, and then assess whether the public understands the mark, *as a whole*, to refer to that genus. On appeal, Frito-Lay cites our decisions in *Gould* and *American Fertility* to suggest that the

Board can somehow short-cut its analysis of the public's perception where 'the purported mark is a compound term consisting merely of two generic words.'...[T]here is no such short-cut, and the test for genericness is the same, regardless of whether the mark is a compound term or a phrase.

Id. at 1830-31 (internal citations omitted).

The Federal Circuit stated that contrary to the Board's findings below, the appellate court's past decisions had repeatedly "emphasized that the Board must consider the mark in its entirety." *Id.* at 1832, n.3. Then it faulted the Board for considering the terms 'pretzel' and 'crisps' individually, and stated "[w]here, as here, the record is replete with evidence of the public's perception of the term PRETZEL CRISPS as a whole, it is unclear why the Board would resort to analyzing the terms individually or why it would believe doing so would aid its analysis." *Id.* at 1833. It further noted that the Board's decision "lacks any indicia" that it engaged in an analysis of the mark as a whole; "[s]pecifically...there is no evidence that the Board conducted the necessary step of comparing its findings with respect to the individual words to the record evidence demonstrating the public's understanding of the combined term: PRETZEL CRISPS." *Id.* The Federal Circuit concluded that "[b]y failing to do so, the Board took the type of short-cut analysis we have said is prohibited and ignored evidence that might compel a contrary conclusion." *Id.*

Among the competent evidence the Board did not give its due was the *Teflon* survey evidence made of record by Princeton Vanguard; in particular, the Federal Circuit noted that "direct consumer evidence, *e.g.*, consumer surveys and testimony is preferable to indirect forms of evidence." *Id.* at 1833 (citation omitted). Moreover, it noted its own preference for survey evidence to establish genericness. *Id.* ("[w]e have likewise recognized that 'consumer surveys may be a preferred method of proving genericness'" (citation omitted). Additionally, the Federal Circuit noted that the Board could not "disregard the results of survey evidence without

explanation,” elaborating “[a]s to Dr. Jay’s survey, which found that 55% of respondents thought that PRETZEL CRISPS was a brand name, the Board merely noted Dr. Simonson’s [Frito-Lay’s rebuttal expert’s] criticism” and “did not agree” with it. *Id.* at 1834.

Respectfully, in this case, the Board should not repeat its past error by “overlook[ing] or disregard[ing] a genericness survey.” *Id.* This is especially true since the survey that the Federal Circuit remanded to the Board to consider in the *Princeton Vanguard* case was a *Teflon* genericness survey conducted with respect to the significance of a descriptive designation (PRETZEL CRISPS). In view of the Federal Circuit’s holding in *Princeton Vanguard*, Frito-Lay’s argument that *Teflon* surveys should be accorded weight only when they test the significance to consumers of “coined” marks that have lost acquired distinctiveness and become generic, is not only baseless but flies in the face of controlling Federal Circuit precedent.²

² Frito-Lay grossly mischaracterizes the holdings of the cases on which it relies for the proposition that *Teflon* surveys are appropriate only to test the genericness of coined marks. Indeed, it is not clear that the proffered surveys in these cases were actually *Teflon*-style surveys. Rather, the courts held that despite the introduction of survey evidence, the marks at issue were generic based on evidence of widespread and regular use by third-parties of the designation at issue, *prior* to the plaintiff’s use of said designation or application for trademark protection. *See Schwan’s IP LLC v. Kraft Pizza Co.*, 79 USPQ2d 1790, 1793-93 (8th Cir. 2006) (noting, in matter involving claims of likelihood of confusion based on “Brick Oven” designation for pizza, the existence of several articles and evidence of use by several competitors of phrase “Brick Oven” to market and describe pizzas cooked in brick ovens or in brick oven styles, preventing plaintiff from claiming trademark rights in said designation); *Hunt Masters, Inc. v. Landry’s Seafood Restaurant, Inc.*, 57 USPQ2d 1884, 1885 (4th Cir. 2001) (in matter involving claim of confusion based on competitor’s use of designation “Crab House,” plaintiff had no protectable interest in “Crab House” because, *inter alia*, both parties disclaimed designation and several establishments referred to themselves as “crab houses” across the country); *Miller Brewing Co. v. G. Heileman Brewing Co., Inc.*, 195 USPQ 281, 285-86 (7th Cir. 1977) (“Lite” in connection with beer found generic, because, *inter alia*, “light” or “lite” widely used in the beer industry to describe a beer’s color, flavor and/or alcoholic content); *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 203 USPQ 642 (7th Cir. 1979) (affirming same). In contrast, in the present matter, there is no overwhelming evidence showing use of the designations CORN THINS and RICE THINS by a widespread segment of Applicant’s competitors, prior to or even after Applicant’s use. Indeed, Real Foods is the only party to use these designations in connection with sales in the U.S. of popped corn and rice cakes. *See* Applicant’s Sum. J. Br. 10. Further, in stark contrast to the examination history of the marks in this consolidated proceeding, which favors Real Foods, the plaintiff in many cases cited by Frito-Lay was not able to overcome objections by the Trademark Office to obtain a registration that protected the designation at issue. Indeed in the *Schwan’s* matter, on three occasions, the Trademark Office considered and denied Schwan’s applications to register marks involving the term “Brick Oven” on the grounds it was generic. *See Schwan’s IP LLC*, 79 USPQ2d at 1791; *see also Hunt Masters*, 57 USPQ2d at 1885 (registration for logo design contained disclaimer of the phrase in issue “crab house”).

In sum, the parallels of this case with the *Princeton Vanguard* case, brought by the same party and on the same grounds, are obvious. That said, Applicant's case here is even stronger insofar as there is no U.S. Patent and Trademark Office ("PTO") practice of requiring consistent disclaimer of the designation THINS as applied to snack foods (as opposed to CRISPS, which is consistently disclaimed). Rather, the meaning of THINS is evaluated in relation to the mark as a whole. A close contextual analysis of the term THINS in relation to the preceding terms CORN and RICE is required not only under the Federal Circuit's decision but is also consistent with PTO disclaimer practice as set forth in Real Foods' moving and reply briefs on its summary judgment motion in this proceeding. Applicant's Sum. J. Br. 16-18; Roberts Dec. at pp. 23-26.

II. Contrary to Frito-Lay's Contentions, Real Foods has Submitted Multiple Sources of Evidence Showing It is the Substantially Exclusive User of RICE THINS AND CORN THINS in the Appropriate Product Category

In its Supplemental Brief, Frito-Lay launches an ineffective piecemeal attack on Real Foods' exclusive rights in the marks in issue. As noted in its summary judgment briefing, Real Foods has made a strong showing that its marks are suggestive—one which is supported by three different Examining Attorneys' decisions not to require a 2(f) claim to support registrability of those marks. *See* Applicant's Sum. J. Br. 7-8. Now, Frito-Lay repeats its meritless contention that the product categories, which in the U.S. are clearly rice cakes and corn cakes, should be "crispbreads." It then challenges the competent evidence Real Foods submitted showing consumer association of its marks with a single source of the goods (namely, Real Foods), urges the court to find a properly conducted *Teflon* survey inadmissible as a matter of law because the marks in issue are not inherently distinctive, levels a specious attack on Real Foods' incontrovertible proof that supposed "third party" use is clearly outside the U.S. and therefore

not probative of any issue in this consolidated proceeding, and lamely attempts to distinguish PTO precedent disfavoring disclaimer of THINS in the context of the subject marks.

First, Frito-Lay defies credulity by arguing the goods in question are not rice cakes and popped corn cakes. In fact, the market share studies showing Real Foods' dominance in key market segments are organized by the rice/corn cake category. *See* Applicant's Sum. J. Br 8-9; Movitz Dec. at ¶¶ 13-14. Third parties—including Frito-Lay's sister company Quaker Oats and Quaker Oats' owned Mother's brand—identify competing products as rice or corn cakes. Applicant's Sum. J. Br. 9; Applicant's Reply Sum. J. Br. 10. None of this evidence identifies the category as "crispbreads" or "crackers". The use of that term was simply a byproduct of the extension of the challenged applications from an International Registration which in turn was based on an Australian registration; Australian consumers, unlike those in the U.S. widely use the term "crispbreads." Real Foods has moved to amend its identification to use the terms "rice cakes" and "popped corn cakes" to comport with industry and consumer understanding of the relevant goods in the U.S. market. The Board is certainly entitled to examine marketing materials and packaging in evidence in this case in order to determine the appropriate product category. *See H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 991 (Fed. Cir. 1986). It need not bury its head in the sand, isolating itself from the realities of the marketplace. Here in the U.S., consumers are exposed to advertising and product packaging that identifies Real Foods' and competing third party products as "rice cakes" and "popped corn cakes" not "rice crispbreads" or "rice crackers" and "corn crackers". Applicant's Sum. J. Br. 2-3, 6, 10; Pels Dec., Exhibit A at, *e.g.*, pp. 3, 5, 16, 106; Pels Dec., Exhibit D at, *e.g.*, pp. 3, 7, 9, 13; Pels. Dec., Exhibit F at, *e.g.*, pp. 3, 8, 11, 17; Applicant's Reply Sum. J. Br. 10; RF App. 0150, 0163, 0167.

Second, the Board should not repeat the mistake of its original decision in favor of Frito-Lay in *Princeton Vanguard* and discount the Internet evidence showing that the vast majority of references on a Google search of CORN THINS are to the Real Foods' product. This evidence is cumulative and consistent with other evidence of record in showing that consumers do not regard the designations in issue as category names but brand names, including the survey evidence in this case. Accordingly, Frito-Lay's reliance on the case *In re Greenliant Systems*, 97 USPQ2D 1078 (TTAB 2010) is misplaced. In that case, the Board affirmed the Trademark Office's refusal to register the mark NANDRIVE primarily because the mark merely combined two separate elements—the term “NAND”, the name of a flash architecture technology, and “drive”, referring to a type of solid state hard drive—and attempted to claim that the combination of the two terms created a new and distinct commercial impression. The Board disagreed and found that simply combining and misspelling “NAND” and “drive” to create NANDrive did not create a new meaning or distinct commercial impression. Thus, the Board found, that the submission of Internet evidence was insufficient to overcome this fact. In contrast, the marks at issue here, CORN THINS and RICE THINS, are not merely a combination of generic terms that describe the relevant products but rather are suggestive designations which are capable of functioning, and do function, as trademarks as evidenced by the record in this matter, including the submitted Internet evidence and consumer survey results. Thus, the Board's approach in *In re Greenliant* is inapplicable in the present matter.

Third, it follows that it would be a repetition of the Board's past mistakes in *Princeton Vanguard* to discount Real Foods' *Teflon* survey as a matter of law, because, as Frito-Lay contends, contrary to the Federal Circuit's ruling, *Teflon* surveys are admissible only to show that coined designations have lost their trademark significance and become generic (*e.g.*

“elevator”, “linoleum”). This is a meritless argument for the reasons set forth above. *See, supra*, pp. 4-5; *Princeton Vanguard*, 114 USPQ2d at 1833.

Fourth, Frito-Lay mischaracterizes the PTO precedent on which Real Foods (and indeed the Examiners charged with examining its applications in issue as well as newly filed applications and past applications for the same designations by a third party) relied to support the lack of a disclaimer for THINS. The precedents most applicable to this case involve products which are incapable of being sliced thinly, regardless of whether the products are savory snack foods. Thus “coffee” cannot be sliced any more than a rice grain or corn kernel can be. *See* RF App. 0049 (COFFEE THINS, registered without a disclaimer); *see also* RF App. 0048 (CINNAMON THIN, registered without disclaimer as “cinnamon” cannot be sliced); RF App. 0072 (WHEAT THINS, registered without disclaimer as “wheat” cannot be sliced). But a “cookie” or a “bagel,” for example, can be sliced. *See* PB 01166 (registration for BLUE THINS in connection with cookies, biscuits, crackers, with THINS disclaimed); PB 01170 (registration for EMMA’S THINS in connection with cookies, with THINS disclaimed); *see also* PB 01299-1321 (affirming mere descriptiveness refusal for application for BAGEL THINS); PB 00344-347 (merely descriptive refusal for application for CUPCAKE THINS); PB 00477-479 (merely descriptive refusal for application for BROWNIE THINS); PB 00597-599 (merely descriptive refusal for application for CAKE THINS).³

Moreover, Frito-Lay’s arguments that the registrations are dated fall flat. Eighteen of the 27 cited registrations issued after January 1, 2000. Further Frito-Lay fails to provide any evidence or support for its contention that consumers’ perception of the term “THINS” has changed since 2000 or that registrations from prior to 2000 are no longer relevant. Indeed, Frito-

³ It is noted that in each of the cited office actions the Examining Attorney suggested registration on the Supplemental Register—an option not available for generic designations.

Lay's argument would have the Board ignore the seminal WHEAT THINS registration, which is valid and subsisting and the precedent establishing the lack of a disclaimer practice in contexts parallel to those here (where the noun preceding THINS cannot be sliced).

Fifth, Frito-Lay attempts again to rely on Rude Health's extraterritorial use of the designations in issue. Frito-Lay falsely states that the web pages Real Foods has submitted to show that these designations are in use exclusively outside the U.S. "do not prove what Applicant says they prove." However, as is evident from the pages themselves, the printouts show "where to buy" the products (the URL appearing on the printout in evidence is "http://rudehealth.com/where-to-buy/") and a user is prompted to a map and a search field which clearly shows a portion of Europe. *See* Applicant's Reply Sum. J. Br. 7; Bhatt Dec. at ¶ 4, RF0038. Nowhere is the U.S. depicted on the map. *See* RF0038. Nor has Frito-Lay submitted any competent evidence establishing Rude Health products are available in the U.S. Instead, Frito-Lay absurdly argues Real Foods' website usage is not probative because it originates from abroad; of course, this argument is beside the point, as Real Foods is selling its products here in the U.S., as the evidence establishes and Frito-Lay does not dispute. Finally, Frito-Lay concedes the Pureharvest usage is limited to Australia. This proceeding of course is not about Real Foods' trademark rights in any country except the U.S., and thus proof of use of either of the marks in issue outside the U.S. is irrelevant. *In re Telechat Network, Inc.*, Serial No. 76535248, 2006 WL 1404223, *2-3 (TTAB, May 11, 2006) (in proceeding involving applicant's telephone and online dating services, finding little significance to references to the designation at issue in Israel, Australia or even Canada as related to determining descriptiveness of mark in the United States); *In re Richard Joseph Couture*, 60 USPQ2d 1317, 1318, n.2 (TTAB 1999) (stating, in appeal based on descriptiveness refusal, that "some of the excerpted stories appeared in foreign

publications (*e.g.*, Canadian), and are of limited probative value because it cannot be assumed that foreign uses had any material impact on the perceptions of the public in the United States”); *In re Men’s Int’l Prof. Tennis Council*, 1 USPQ2d 1917, 1918 (TTAB 1986) (finding that publications and NEXIS materials from countries other than the United States were not probative to determine perception of relevant public in the United States as to whether term MASTERS was descriptive for tennis events); *In Re Cantor G&W, L.P.*, Serial No. 77819424, 2012 WL 3992901, at *3 (TTAB, Aug. 29, 2012) (finding, in appeal involving descriptiveness of designation for certain gambling services, that foreign resources were not probative of how relevant U.S. purchasers would perceive the term in this country).

III. CORN THINS and RICE THINS Can and Do Function as Trademarks

Frito-Lay relies upon several cases for the proposition that the marks in issue are not capable of functioning as trademark identifiers even if not generic. A consideration of the marks in issue in each of these cases makes it clear they are distinguishable. Unlike the suggestive terms RICE THINS and CORN THINS, the marks in issue in the precedent upon which Frito-Lay relies were merely laudatory (“The Best Beer in America”) or directly descriptive as applied to the goods (“Electric Candle Company” for electric candles). This cannot be said of the marks RICE THINS and CORN THINS as applied to rice and popped corn cakes in the instant case. Accordingly Frito-Lay has failed to sustain its burden in this consolidated opposition, and its arguments that the marks in issue cannot function as source identifiers fail.

IV. Conclusion

For the foregoing reasons and those set forth in Real Foods' prior briefing in this matter, Real Foods' CORN THINS and RICE THINS marks are suggestive and/or have acquired distinctiveness and the opposition should be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2016, a copy of the foregoing Applicant's Supplemental Brief is being deposited with the United States Postal Service with sufficient postage as first-class mail in an envelope addressed to the attorneys for Opposer as follows:

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/s/ Ami Bhatt

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